

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re applications of) MM Docket No. 93-475
)
Trinity Broadcasting of Florida, Inc.)
for Renewal of License of Station) File No. BRCT-911001LY
WHFT-TV, Miami, Florida)
)
Glendale Broadcasting Company)
for a Construction Permit for a New) File No. BPCT-911227KE
Commercial Television to Operate on)
Channel 45, Miami, Florida)

To: Hon. Joseph Chachkin
Administrative Law Judge

**REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
THE SPANISH AMERICAN LEAGUE AGAINST DISCRIMINATION**

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INTRODUCTION

1. The Spanish American League Against Discrimination ("SALAD") respectfully submits its reply findings and conclusions on the issues designated against Trinity Broadcasting of Florida, Inc. ("TBF") and Trinity Broadcasting Network ("TBN") for hearing in the HDO, 8 FCC Rcd 2475 (1993).

2. SALAD concurs with the Findings and Conclusions relating to the TBN and TBF qualifying issues and the TBN/TBF renewal expectancy issue as set out in the initial brief and reply brief of Glendale Broadcasting Company ("Glendale"), except as discussed below.^{1/} SALAD is in general agreement with the Findings of the Mass Media Bureau in its initial brief. SALAD respectfully disagrees with the Bureau's Conclusions on the TBN qualifying issues.

3. The bottom line of this case is whether TBN/TBF's conduct was disqualifying. SALAD believes that the Court will find its submission to have maximum value, given SALAD's resources, if SALAD explains why it differs with the Bureau's conclusion that renewal may be granted. That will be the sole focus of this brief.

^{1/} On one point, SALAD differs with Glendale: SALAD does not believe that an applicant's wealth or size, or its access to the monies of innocent third parties, should be taken into consideration in deciding whether to issue a forfeiture or deny renewal. See discussion at n. 4 infra.

REPLY CONCLUSIONS OF LAW

**A. TBN Abused The Commission's Processes
To Evade The Provisions Of Section
73.3555(e) Of The Commission's Rules**

4. The Bureau's Findings and Conclusions ("Bureau F&C"), ¶¶295-296 and 298-303, correctly state and apply the law of abuse of process. In particular, the Bureau accurately observes notes that a showing of abuse of process requires a showing of intent, and that intent can be inferred from a preponderance of the evidence of the extreme unreasonableness of the accused's behavior. Furthermore, the Bureau correctly notes that the intentional absence of de facto control by minorities of an entity held out as minority controlled for the purpose of receiving a Commission benefit is an abuse of process.

5. The Bureau's Findings and Conclusions rely on language in Amendment of Section 73.3555, 100 F.2d 74, 97 (1985) (emphasis supplied). Bureau F&C, ¶299. The Bureau's analysis should not be misread as suggesting that the Commission's concern that licensees possess de facto control originated in 1985, with the creation of the Mickey Leland Rule.^{2/} See Bureau F&C ¶299. As every FCC

^{2/} The Bureau notes that the Mickey Leland Rule provides that fourteen stations of a given type may be acquired where at least two have cognizable interests owned and controlled by minorities. Amendment of Section 73.3555, 100 F.2d at 97 (emphasis supplied). The Bureau is absolutely correct. The rule, 47 CFR §73.3555(d)(1), prohibits control by those other than the applicant, "directly or indirectly, owning, operating or controlling, or having a cognizable interest[.]" Note 1 to the Rule requires that minorities possess "actual working control in whatever manner exercised."

practitioner well knows, the concept that an applicant had to have de facto control to receive the fruits of the an ownership incentive rule originated much earlier -- two generations before the 1981 birth of Translator TV, Inc. ("TTI", the precursor of National Minority TV, Inc. ("NMTV")).

6. When an applicant claims any Commission benefit not available to others, it inherently holds out to the Commission that its has truthfully identified its locus of control. That is because the Commission always assumes that those claiming these benefits will use the benefits to deliver programming which serves the public interest.

7. That assumption derives logically from the bedrock principle that licensees must control station programming. Trustees of the University of Pennsylvania, 69 FCC2d 1394 (1978). Thus, in making licensing decisions aimed at diversifying station programming, the Commission is inherently assuming that those coming before it, and claiming to diversify station programming possess de jure and de facto control of the entity being licensed. When that assumption appears unjustified, the Commission does not hesitate to take steps to pierce the veil. KIST Corp., 102 FCC2d 288 (1985).

2/ (continued from p. 2)

Ownership integrity concerns in this case do not only involve fronts of minorities. Fortunately for minorities, racial integration in American broadcasting has not progressed to the point where minorities have achieved the same level of opportunities as nonminorities to be embraced by fraud promoters. Indeed, not all of TBN's frauds have involved minorities. See SALAD Findings & Conclusions ¶9 (discussing the lack of independence of Janice Crouch as a TBN director in order for NMTV to fraudulently obtain diversification preferences.) See also International Panorama (I.D.), FCC 83D-4 (released January 25, 1983) (SALAD Ex. 35, p. 3).

8. The principle that program diversity flows from licensee control is more firmly embedded in communications jurisprudence than any other principle. The Commission's express reliance on those it recognized as station owners to provide a diverse program service dates to three years before the Second Great War. In Chain Broadcasting Rules, 3 Fed. Reg. 747 (1938), the Commission first regulated network ownership of radio stations. Even then, the Commission had concluded that licensee control affected the programming received by the audience. The result of that assumption was a rule limiting network ownership of stations, which evolved into 47 CFR §73.658(f). That rule has been construed as having the "plain intent" of preventing "ownership or substantial measure of control...as to restrain, through limitation of competition, the receipt by the public of a variety of...programs" (emphasis supplied). Hudson Valley Broadcasting, 13 RR 49, 58-59 (1956). Thus, the nexus between licensee control and program service has been an underlying assumption of FCC diversity policy almost since the inception of modern broadcast regulation.

9. The Commission's ownership/programming nexus also found its voice in nonstructural, "jawboning" policy statements, beginning with the Blue Book (Public Service Responsibility of Broadcast Licensees (March 7, 1946)) at 15. The 1960 Policy Statement (En Banc Programming Inquiry, 44 FCC 2303, 2314 (1960)) expressly recognized each station's responsibility to serve minority groups,

again relying on those in control of a station to effectuate the licensee's responsibilities.^{3/}

10. When the Commission's tax certificate policy was first adopted in 1971, de facto and de jure control were required to insure that when a newspaper sold a radio station, the radio station would not secretly continue to be operated by the newspaper. Issuance of Tax Certificates, 19 RR2d 1831 (1970). The same principle applied in TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert denied, 419 U.S. 986 (1974). When the Commission adopted the tax certificate and distress sale policies, it again assumed that the minorities being given these benefits would be in both de jure and de facto control of the station. Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979, 980 (1978).

^{3/} The virtual elimination of program content regulation only enhanced the importance of licensee control as the preferred route to the FCC's program diversity goals. In 1981, the year TTI was founded, the Commission held that "[i]t may well be that structural regulations such as minority ownership programs and EEO rules that specifically address the needs of [minorities] is preferable to conduct regulations that are inflexible and often unresponsive to the real wants and needs of the public." See Deregulation of Radio, 84 FCC2d 968, 1036, recon. granted in part, 87 FCC2d 797 (1981), aff'd in pertinent part sub nom. Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). After deregulation, the Commission's structural rules largely determine whether the public obtains a diverse spectrum of broadcast content.

11. This control/diversity nexus policy has also manifested itself in the well established "real party in interest" concept. See, eg., Arnold L. Chase, 5 FCC Rcd 1642 (1990). The policy is also expressed in the 1965 Policy Statement, 1 FCC2d 393, 394 (1965), which held that "[d]iversification of control is a public good in a free society and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities" (emphasis supplied).

12. Thus, in no way can TBN's evasion of the multiple ownership rule be deemed unintentional. All of the multitude of acts and omissions cumulatively comprising this evasion were conscious and interrelated. The law was crystal clear and over two generations old. TBN must be found to have grossly abused the Commission's processes in connection with the Mickey Leland Rule.

**B. TBN Abused The Commission's Processes
To Improperly Claim Minority Preferences
In LPTV Applications**

13. The Bureau erroneously maintains that the Commission's lottery preference system emphasized "ownership" over "control", as though the two concepts were unrelated. Bureau F&C, ¶304, citing Random Selection Lotteries, 93 FCC2d 952, 977 (1983) and Public Notice No. 6030 (released August 19, 1983) for the proposition that "a non-stock entity a majority of whose governing board consists of minorities is entitled to claim a minority preference in an LPTV lottery." This reasoning is flawed for three reasons.

14. First, the Commission never emphasized "ownership" over "control." As discussed in Glendale's Reply Brief, the lottery rules were developed to implement a Congressional statute which found that minority ownership and control diversifies programming. The Commission has never found, nor could it, that the mere presence of minority names on paper -- which is all ownership amounts to without control -- has any nexus to the program diversity Congress had in mind.

15. Second, apart from concerns about control, the Commission does not robotically impute "ownership" to everyone who says he or she is an "owner." Since the minorities on NMTV's Board did not exercise the responsibilities of ownership, they cannot in any sense be deemed "owners." Thus, the Bureau's observation that "a majority of TTI/NMTV's board of directors consisted of members of recognized minority groups" is not dispositive at all. See Bureau F&C, ¶305.

16. Third, even if the Commission's policy really were to "determine eligibility for a minority preference in non-stock corporate LPTV applicanty exclusively on the basis of the composition of the applicant's governing board" (Bureau F&Cs ¶305; emphasis in original), it does not follow that neither Crouch nor TBN abused the Commission's processes. They abused the Commission's processes by failing to disclose that the purported "owners" of NMTV were highly unusual -- indeed unprecedented -- in that they did not control NMTV.

17. Thus, TBN and Crouch must be found to have abused the Commission's processes in connection with NMTV's low power applications.

C. TBN Is Not Entitled To Renewal

18. The Bureau correctly concluded that "TBN was NMTV" (emphasis in original). Bureau F&C, ¶302. Thus, SALAD was astonished to find that the Bureau did not support nonrenewal. Id., ¶¶306-307. Instead, the Bureau urges the application of \$500,000 in forfeitures.^{4/}

^{4/} Glendale's Reply Findings and Conclusions will argue that the level of this forfeiture is too small to mean much, and that therefore the only meaningful course of action available to the Commission is nonrenewal. SALAD agrees with the premise but respectfully disagrees with the conclusion of this argument.

The forfeiture level is indeed trivial, given the stupendous size of this licensee. And Glendale may be correct in guessing that TBN, having no duty to do so, will not disclose to members of its audience that their donations will be used to construct battleships for the Navy rather than houses of worship for the faithful. Surely the argument has been made that the Commission has regulated more aggressively when confronted by small licensees' wrongdoing than big licensees' wrongdoing. See Catocin Broadcasting Corp. of New York v. FCC, 4 FCC Rcd 2553 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990) (involving 500 watt AM standalone).

However, the size of TBN, and the size of any possible forfeiture, are completely irrelevant to the choice of remedy. The choice of remedy is a decision to be made independently of, and subsequent to, the decision on whether renewal is authorized at all. Thus, even if the forfeiture amount exceeded the station's value (a fact not in evidence), or even if Congress had not authorized forfeitures at all, a possible forfeiture amount could not be considered by the Court in deciding whether to renew this or any other license.

Not only is that good law, it is good policy. If the only motive for compliance is fear of pecuniary loss, broadcasting will truly have relinquished its claim to exceptional moral leadership. See Nondiscrimination in the Employment Practices of Broadcast Licensees, 13 FCC2d 766, 771 (1968), in which the Commission cited with approval this statement by the Department of Justice:

Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.

19. The Bureau misreads the cases holding that an exercise of de facto control over another licensee generally does not result in nonrenewal or revocation. See Bureau F&C, ¶308. As set out in Glendale's Reply Findings, and concurred in by SALAD, the cases relied on by the Bureau are unique to their facts and cannot be read, individually or collectively, as supporting any such theory.

20. Instead, the Commission has not hesitated to treat abuses of process as disqualifying. See Abuses of the Commission's Processes, 3 FCC Rcd 4740 (1988).

21. The Bureau urges that "the evidence does not support a conclusion that Crouch, TBN or NMTV intended to deceive the Commission." Bureau F&C, ¶310. That conclusion is directly at odds with its earlier finding that repeated abuses of process -- which includes scienter -- had occurred. Intent to abuse the process is intent to deceive the Commission. SALAD is completely at a loss to understand how the Bureau can simultaneously advocate these two irreconcilable positions.

22. The Bureau cites two mitigating factors: "religious zeal" and a "novel and bizarre legal theory." Bureau F&C, ¶310.

23. The Bureau's "religious zeal" theory may be disposed of easily. Surely, TBN was blessed with religious zeal. But the Bureau does not cite any evidence that it was TBN's religious zeal that motivated TBN to deceive the Commission. Compare King's Garden, Inc., 38 FCC2d 339, 341 (1972), aff'd, 498 F.2d 51 (D.C. Cir. 1974) ("King's Garden"). Instead, this is an ordinary conceal-and-misrepresent case, in which earthly rather than heavenly factors motivated TBN's actions.

24. Furthermore, the Bureau's "religious zeal" theory proves too much. Religious zeal cannot draw mitigating weight unavailable to nonreligious applicants without offending the Establishment Clause. Secular humanist zeal, atheistic zeal, agnostic zeal, and plain old worship-of-money zeal do not qualify; thus, religious zeal cannot qualify either.^{5/}

24. In any event, TBN has not preserved, and does not rely on "religious zeal" as a defense. Thus, the Court cannot consider it. See TBN F&C ¶¶655-656, which cited the religious nature of the company only in support of a showing of a suggestion of innocent inchoateness of structure, without any suggestion that religious zeal motivated TBN to behave in any particular way in its filings with the Commission.

25. Thus, the Bureau's position -- and the outcome of this case -- boils down to the effect to be given to TBN's reliance on the oral advice of counsel.

^{5/} TBN's religious nature, quite apart from its religious zeal, does not immunize it from compliance with the civil laws. Those laws apply equally to all. See Faith Center, Inc., 82 FCC2d 1 (1980); PTL of Heritage Village Church and Missionary Fellowship, Inc., 71 FCC2d 324 (1979); King's Garden, *supra*; *cf.* Bob Jones University, 42 FCC2d 522 (1973).

26. There are circumstances in which an innocent ingenuer's reliance on the advice of morally weak or crooked counsel may mitigate serious wrongdoing otherwise attributable to the ingenuer. See, e.g., Georgia Public Telecommunications Commission, 7 FCC Rcd 2942, 2949 ¶36 (Rev. Bd. 1992) and Ponchartrain Broadcasting Co., Inc., 5 FCC Rcd 3991, 3993 ¶11 (Rev. Bd. 1990) (subsequent histories omitted). This is hardly such a case. Paul Crouch may be ingenious, but he is not ingenuous. He runs the largest broadcast company in the world, and he has run it for a very long time. Nor are Colby May and Joseph Dunne morally weak or crooked. If Messrs. May and Dunne erred, their errors belong to their client. Carol Sue Bowman, 6 FCC Rcd 4723 (1991).

27. In any event, the Court need not rely on TBN's size and expertise in finding that TBN's and the Bureau's counsel reliance theory is unworthy of credit. The Court may comfortably decline to even to reach that issue because it is impossible to believe that the preposterous advice supposedly provided by May & Dunne was ever provided at all.^{6/}

28. Messrs. May and Dunne never provided such advice because they know the legal basics. As SALAD has shown, the antecedents to the nexus between licensee control and the Commission's program diversity goals are the very bedrock upon which communications law resides. See ¶¶5-12 supra.

^{6/} Their actual advice was not quite as extreme as that imputed by the Bureau. May admitted that a minority preference claim would be inappropriate if a director was not attending meetings, participating in discussion and voting, and generally directing the affairs and policies of NMTV. Tr. 3111, 3121-22.

29. Among the many authorities for the nexus between the genuineness of licensee control and the Commission's program diversity goals are the Blue Book, the 1960 Policy Statement, and the 1965 Policy Statement. These documents in American broadcasting are as well known and revered by communications lawyers as the Trinity is well known and revered by Christian theologians.

30. SALAD points this out to show how silly it is for a licensee to claim that it, or its lawyers, did not know that the FCC required its de jure owners to have de facto control. When essentially every element of a licensee's operation points to the delegation of control to a third party, it is fatuous to suggest that the consequences of that delegation, including the inherent fraud on the Commission, were unintentional or traceable to the oral advice of its FCC specialist attorneys.^{7/}

31. No lawyer with the FCC boutique of May & Dunne ever advised any client, with a straight face, that it could just write down anyone's names on an FCC application without regard to whether these persons actually controlled the applicant. May & Dunne didn't do this for the same reason that hematologists do not advise bloodletting by leeches, oral surgeons do not advise tying teeth to strings and pushing patients out of trees, and air traffic controllers do not warn pilots not to fly off the edge of the flat earth.

^{7/} In their Brief, TBN's exceptionally gifted new counsel cite various snippets of decisions for the proposition that the Commission has not always been crystal clear about the value of licensee control. TBN Findings and Conclusions, ¶¶659-660. But TBN did not show that its former counsel relied on these authorities when they provided TBN with their oral advice. In any case, none of these authorities significantly undermine the bedrock proposition that the locus of control in a licensee owners is the essential predicate to the regulatory scheme. See ¶¶5-12 supra.

32. Of course May & Dunne might have genuinely felt that the FCC should hold that the earth is flat. If that is so, the threshold question the Court must decide is whether such a belief was principled.

33. Principled opposition to established policy finds its voice in two public exercises of process -- civil disobedience and legal actions seeking to overrule longstanding precedent. In both cases, the earmarks of principled of opposition to established law are (1) full disclosure of one's current or intended violation of existing law; and (2) a readiness to accept adverse consequences while seeking to test and reform the law. That is why Rosa Parks neither scrunched down in her seat nor pled guilty to a misdemeanor.

34. Whatever ill may be thought of the licensee in King's Garden, at least that licensee disclosed its intention not to hire non-Christians for any radio station jobs, on the theory that civil law is without force when stood against God's law. See also Bob Jones University, supra (licensee openly disclosed its policy of prohibiting interracial dating).

35. Thus, both civil disobedience and principled opposition to existing law require full disclosure. May & Dunne knew this because every communications lawyer has read RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981) several times.

36. If May & Dunne genuinely thought that a licensee should be able to put down any names it wished and claim minority or diversification preferences, it could have sought a declaratory ruling, or advised its client to openly disregard existing law, conceal nothing, and follow the course of religious civil disobedience -- a worthy approach without which Americans would still be riding segregated buses to work.

37. Finally, the Bureau is wrong in asserting that denial of renewal "is necessary to ensure the future reliability of Crouch and TBN or the truthfulness of their submissions", citing Character Policy Statement, 102 FCC2d 1179, 1228 (1986). Bureau F&C, ¶311. The Character Policy Statement makes it clear that "in the most egregious case," nonrenewal is justified. Id. Here, It took four pleadings before TBN finally began to disclose the basic nature of its relationship with NMTV. Compare Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988) (three sets of conflicting pleadings). As the RKO court made clear, "the Commission is not expected to play procedural games with those who come before it in order to ascertain the truth[.]" RKO, 670 F.2d at 229.

38. Furthermore, Crouch's and TBN's conduct at the hearing itself was riddled with misrepresentations. If they cannot be trusted to be reliable and truthful under oath in front of an Administrative Law Judge, they cannot be trusted to be reliable and truthful when nobody is looking and they're not subject to discovery and crossexamination.^{8/}

^{8/} The Bureau observes that "Crouch and TBN are now in compliance with the multiple ownership rules." Bureau F&C, ¶311. That observatious is gratuitous at best. There has been no showing that the recent sale of one of TBN's stations was motivated by a desire to come into compliance with the Commission's multiple ownership rules. Indeed, if that had been TBN's motivation, it would have come into compliance immediatedly after the Borowicz Petition was filed in 1991. In its LPTV applications, NMTV continued to claim minority preferences for the applications it filed before April or May, 1993. TBF Ex. 105 ¶19; MMB Ex. 149, p. 7; MMB Ex. 201, p. 7; MMB Ex. 247, p. 4; MMB Ex. 285, p. 4. Thus, the fact that a fortuitous assignment of a full power TV license has occurred years after TBN was on notice it was being watched is hardly suggestive of licensee responsiveness to concerns about its law compliance. See NBMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985) (11th hour compliance entitled to no weight because licensee knows the Commission is watching).

CONCLUSION

39. "I know of no way of judging the future but by the past."^{2/} International Panorama shows that TBN's past is prologue to more misrepresentation, more deceit and more fraud. It is time to call a halt to this, and that can only be done by denying renewal. Absent denial of renewal, every licensee may rest comfortably knowing that it may completely assume control of another licensee for years, conceal it, lie about it, and get away with it.


40. No responsibility can weigh more heavily on an Administrative Law Judge than that of having to deny a license renewal application. To say that this step should not be taken lightly is a grave understatement. It is never grounds to rejoice when a licensee has failed this fundamentally to meet its responsibilities under the Act and the Rules. The government may be impelled to ask where it went wrong in failing to notice this massive a fraud for so long. TBN's frauds did come to light through the invocation of process. Eventually, the Commission recognized TBN's conduct for what it was. The controversy was litigated thoroughly, collegially and dispassionately. That shows that the system does work.

41. Furthermore, the system is fair. If neither TBF's nor Glendale's application is granted, TBF is free to reapply and prove that it has truly reformed itself. And if Glendale's application is granted, TBF will be free to do as Glendale has done -- file a mutually exclusive application when the station applies for renewal.

^{2/} Patrick Henry.

42. The late Board Member Blumenthal framed it best: "we are here confronted with a licensee that could easily give the harsh penalty of non-renewal a very 'good name.'" Catoctin Broadcasting Corp. of New York, 2 FCC Rcd 2126, 2140 (Rev. Bd. 1987). With the most profound sadness, coupled with resolve, SALAD respectfully urges the Court to deny the WTBF-TV license renewal application.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, David Honig, this 7th day of October, 1994, hereby certify that I have caused to be delivered by hand the foregoing "Reply Findings and Conclusions" addressed to the following:

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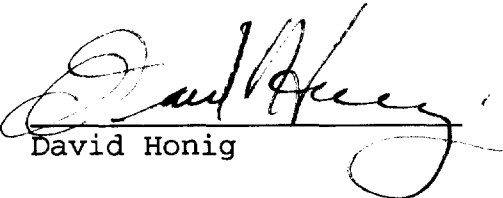
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